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MENK SDN BHD

v.

JOERG HUGO SCHMIDT

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COURT OF APPEAL. PUTRAJAYA
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: J-02-480-07]

C

19 DECEMBER 2008

CIVIL PROCEDURE: *Injunction - Mareva injunction - Setting aside - Principles applicable - Good arguable case - Failure to assess evidence - Dissipation of assets*

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The plaintiff/respondent, General Manager in the appellant company until the termination of his contract of service, commenced a suit in the High Court against the appellant for, *inter alia*, damages and losses. He then filed an application for a Mareva injunction over all the appellant's assets to the extent of

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RM4.5 million; he succeeded in obtaining an *ex parte* injunction against the latter. The appellant subsequently filed an application to set aside the *ex parte* injunction order. The judge, having heard the respondent's application for the Mareva injunction *inter parte*

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together with the setting aside application, allowed the respondent's application. The appellant, being dissatisfied, filed the present appeal contending that the court had: (i) incorrectly equated the identification of a serious issue to be tried as establishing a good arguable case, with the question of whether a

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breach of the contract of employment had occurred as that serious issue; and (ii) erred in holding that there was a real risk that the appellant would dissipate its assets and, so, stultify a judgment.

Held (allowing the appeal)

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Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The judge, on the facts, had erred when: (a) he equated "a good arguable case" with a mere identification of a serious

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question to be tried (a test for an *interim* injunction under O. 29 of the Rules of the High Court 1980 at best), compounded by his failure to assess the evidence (leading to

an inability to decide whether a good arguable case had been established); and (b) he failed to sift through the evidence adduced, thus denying himself the chance to infer that the dissipation of the appellant's assets would lead to a stultifying of a judgment. (para 36)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden, seorang Pengurus Am dalam syarikat/perayu sehingga penamatan kontrak kerjanya, memulakan suatu guaman di Mahkamah Tinggi terhadap perayu untuk, antara lain, ganti rugi dan kehilangan. Beliau selepas itu memfail satu permohonan untuk mendapat suatu injunksi Mareva atas semua aset-aset perayu sehingga RM4.5 juta; beliau berjaya memperolehi suatu injunksi *ex parte* terhadap perayu. Perayu kemudiannya memfail satu permohonan untuk mengenepikan perintah injunksi *ex parte* itu. Hakim, setelah mendengar permohonan responden untuk injunksi Mareva *inter parte* itu bersama-sama dengan permohonon pengenepian itu, membenarkan permohonan responden. Perayu, berasa tidak puas hati, memfail rayuan semasa menghujahkan bahawa mahkamah telah: (i) secara tidak betul menyamakan identifikasi suatu isu serius untuk dibicara sebagai membuktikan satu kes bagus yang dapat ditahankan, dengan soalan sama ada sesuatu pemungkiran kontrak pekerjaan telah berlaku sebagai isu serius itu; dan (ii) khilaf dalam memutuskan bahawa terdapat sesuatu risiko nyata bahawa perayu akan melesapkan aset-asetnya dan, oleh itu, membuntukan suatu penghakiman.

Diputuskan (membenarkan rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Hakim, atas fakta-fakta, telah khilaf apabila: (a) beliau menyamakan "satu kes bagus yang dapat ditahankan" dengan sesuatu identifikasi suatu isu serius yang seharusnya dibicara (satu ujian untuk injunksi *interim* di bawah A. 29 Kaedah-kaedah Mahkamah Tinggi 1980 paling bagus pun), ditambahkan dengan kegagalannya untuk taksir keterangan (membawa kepada satu ketidakmampuan untuk menentukan sama ada satu kes bagus yang dapat ditahankan telah dibuktikan); dan (b) beliau gagal mengkaji keterangan yang dikemukakan, oleh

A yang demikian menghalang dirinya peluang untuk membuat inferens bahawa pelesapan aset-aset perayu akan membawa kepada pembuntuan suatu penghakiman.

[Diperintah sedemikian.]

B **Case(s) referred to:**

Ace King Pte Ltd v. Circus Americano Ltd & Ors [1985] 2 MLJ 75 ***(refd)***

Allen v. Jambo Holdings [1980] 2 All ER 502 CA ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

C *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA* ***(refd)***

CBS United Kingdom Ltd v. Lambert & Anor [1982] 3 All ER 237 ***(refd)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 MLJ 153 ***(refd)***

European Grain & Shipping Ltd v. Compania Naviara SA & Ors [1990] 2 MLJ 291 ***(refd)***

D *Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 12 Lloyd's Rep 509* ***(refd)***

Ninemia Maritime Corp v. Trave Schiffahrthesellshaft mbH & Co [1983] 1 MLJ 1412 ***(refd)***

The Nagasaki Spirit (No 1) [1994] 1 SLR 434 ***(refd)***

E *Third Chandris Shipping Corporation & Anor v. Unimarine SA [1979] 2 All ER 972* ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (Malaysia) [1984] 2 MLJ 143 ***(refd)***

Seema Development Sdn Bhd v. Mah Kim Chye & Anor [1998] 1 CLJ 174 HC ***(refd)***

F *Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1981] 1 CLJ 134; [1981] CLJ (Rep) 307 HC* ***(refd)***

Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260 ***(refd)***

G *For the appellant - Edward Saw (LK Mak with him); M/s YH Teh & Quek*
For the respondent - Mahathir Abdullah; M/s Raslan Loong

Reported by Suresh Nathan

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JUDGMENT

Suriyadi Halim Omar JCA:

[1] This appeal was allowed with costs by this panel, and we I thereupon had set aside the Mareva injunction ordered by the High Court against the defendant, hereinafter referred to as the appellant. We now recap the facts.

[2] By a Contract of Service dated 16 August 2002 the plaintiff (hereinafter referred to as the respondent), was employed as a General Manager in the appellant company, which is a subsidiary of Menk Apparatebau GmbH of German, with a salary of RM18,000 per month together with a month's contractual bonus. He was also entitled to a monthly entertainment allowance of RM4,500, accident insurance coverage of RM864,000, medical insurance coverage of RM3,000, hospitalization and surgical insurance premium of RM17,482.87 with Allianz Worldwide Care, profit sharing of 1% on the company's audited annual profit and the use of a company car, inclusive of toll and petrol.

[3] Amongst the terms of the contract were that the employee-employer relationship shall end at the month ending upon the respondent reaching the age of 63 or upon his claim of pension of occupational disability or invalidity. The respondent had further averred that the appellant's representative ie, one Mr. Otto Karl Gross had repeatedly affirmed that his employment with the appellant was secure and will continue as long as the appellant continued to generate profits. The respondent commenced employment with the appellant on 1 October 2002. Later the appellant had his employment pass extended for a maximum period of five years from 9 February 2006 to 16 January 2011.

[4] Disgruntlement surfaced when on 22 June 2006 the respondent was served with a notice, also dated the same day, notifying him that the Contract of Service would be terminated upon the expiry of three months period ie, on 30 September 2006. At that time, the respondent was only 49 years old and going by the terms of the contract, he still had a 14 good years left to serve.

[5] The respondent commenced a suit ie, Civil Suit MT-22-19-2007 on 19 January 2007 in the High Court at Johor Bahru against the appellant for damages of RM4,335,064.43, for losses suffered by him for the period between October 2006 until 23 August 2019, or damages to be assessed with interests. On 19 January 2007, the respondent filed an application, as per encl. 4, for a Mareva injunction over all the assets of the appellant to the extent of RM4.5 million. On 30 January 2007 he succeeded in obtaining an *ex parte* injunction against the latter.

[6] On 9 February 2007, the appellant filed an application to set aside the *ex parte* Mareva injunction order. On 26 March 2007 the learned judge heard the respondent's application of encl. 4 for the Mareva injunction *inter parte* together with the setting aside application.

[7] Having heard the matter the learned judge allowed the respondent's application for the Mareva injunction. He had concluded as per his judgment that:

i. the respondent had successfully proven a good arguable case. He authored that the serious question in the nature of the contract of service being a long-term one, and whether a breach of it had taken place, and required to be addressed by a full-blown trial, was the foundation of a good arguable case; and

ii. whether German or Malaysian law applied in this case, also fell within the realm of question of fact, which could only be determined at trial, hence establishing a good arguable case;

iii. no fortification was required to fortify his undertaking, on this issue the learned judge had alluded to *Allen v. Jambo Holdings* [1980] 2 All ER 502 CA in support of that stand, where an undertaking was not required of a poor plaintiff. This case was also referred to in *Seema Development Sdn Bhd v. Mah Kim Chye & Anor* [1998] 1 CLJ 174 HC.

[8] The appellant being dissatisfied with the decision had thereupon filed this appeal. The appellant's main complaints centered on the ground that the court had:

1. incorrectly equated the identification of a serious issue to be tried, as establishing a good arguable case, with the question of whether a breach of the contract of employment had occurred as that serious issue; and

2. erred in holding that there was a real risk that the appellant would dissipate its assets and so stultifying a judgment.

[9] The respondent's approach towards the establishment of a good arguable case, as reflected from the pleadings and notes of proceedings, very much depended on the interpretation of his contract of service. He ventilated that he had a long-term

Contract of Service, and the provision as to termination in cl. 2.2. was subject to cl. 2.3, in that the three months notice period was predicated by the requirement of just cause and excuse being established. By terminating the Contract of Service on 22 June 2006, the appellant had breached the respondent's legitimate expectation that the Contract of Service would continue until he attains the age of 63. Due to the termination, he suffered losses and damages, in the like of salary and benefits amounting to RM4,335,064.

[10] He further canvassed that the appellant's termination of the Contract of Service was *mala fide*, in that it was to facilitate its closing down operations in Malaysia. There was a real risk that the appellant would dissipate or remove all its assets and landed properties in Malaysia, beginning March 2007, before the civil suit was determined. The appellant in fact had conceded that they were moving out of Malaysia.

[11] The respondent canvassed that there were thus serious issues to be tried, in particular whether there was a breach of the express terms of the Contract of Service by the appellant, when it prematurely and wrongly terminated the employment contract before the age of 63. The side issue of delay in the application could not be taken against him as he only knew of the company's intention to cease operations in Malaysia, and relocate to China, sometime in March 2007. The exchange of e-mails between the members of the inner circle of the company, of the intention to relocate never was made known to him (JSH8). The respondent further contended that the balance of convenience tilted towards him, as his losses exceeded that of the appellant in the event were he to be deprived of the fruits of litigation, let alone he had given an undertaking on damages as reflected in the application.

[12] The appellant had countered that cl. 2.2 was not subject to cl. 2.3, in that the notice provision of three months in cl. 2.2, merely relates to termination by notice whereas cl. 2.3 was in regard to summary dismissal. For easy reference we reproduce the relevant clauses:

Clause 2.2:

The employment contract may be terminated by either party with three months notice required, at the end of a quarter.

If termination is proposed by either party, it has to be given in writing. The termination notice is properly served, if the receiver receives the written termination notice before the commencement of the termination period.

Menk is authorized, in the event of termination notice given by either party and for any reason, to relieve the employee of his duties and to pay him the salary until the end of the termination period. Any leave due is taken into account for this period.

Clause 2.3:

The employment contract may be terminated by either party, if important reasons prevail, through extraordinary termination.

Clause 2.4:

The probation period is six months and during this period either party may terminate the employment contract with one month notice, at the end of a month.

[13] By reason of cl. 12.4, the contract of service was subject to German labour law and since German law prohibits claim for damages the plaintiff's suit was unsustainable for a Mareva injunction. In fact the appellant had emphasised that it was under no obligation to furnish reasons for the termination. It further averred that there was delay in the making of the application for injunctive reliefs in January 2007 as the respondent already had knowledge of the appellant's intention to relocate their operations to China as early as November 2006.

Reasons For Allowing The Appeal

[14] Before delving into the provided facts, and whether the Mareva injunction should have been granted, it would be beneficial if certain ground rules and appreciation of the law regarding an injunction of this nature be laid down. The Mareva injunction obtained its name from *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 12 Lloyd's Rep 509, with the heart and core of that injunction being granted purposefully to restrain the defendant from removing its assets from the jurisdiction and stultifying any judgment given by the court. Lord Denning at p. 510 in the above case had observed:

> If it appears that the debt is due and owing – and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment – the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction. There is money in a bank in London which stands in the name of these time charterers. The time charterers have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the ship owners may never get their charter hire. The ship is now on the high seas. It has passed Cape Town on its way to India. It will complete the voyage and the cargo discharged. And the ship owners may not get their charter hire at all. In face of this danger, I think this court ought to grant an injunction to restrain the defendants from disposing of these moneys now in the bank in London, until the trial or judgment in this action. If the defendants have any grievance about it when they hear of it, they can apply to discharge it. But mean while the plaintiffs should be protected. It is only just and right that this court should grant an injunction.

[15] It can safely be stated that the earliest attempt made for this form of injunction in Malaysia was before Hashim Yeop Sani J in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd* [1981] 1 CLJ 134; [1981] CLJ (Rep) 307 but was dismissed, on the premise that it had no place here. The Federal Court on appeal, in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260 had held otherwise. It ruled without reservation that the High Courts in Malaysia indeed had jurisdiction to grant this order. Raja Azlan Shah CJ (Malaya) (as HRH was then) had said:

> The Mareva injunction is an established feature of English law. The English courts have provided guidelines in the scope, logistics and machinery of the Mareva injunction. It is a copy book example of the consequences of judicial intervention by way of a new doctrine. It is an injunction granted *ex parte* against defendant in a pending action **to restrain him from removing assets from and now even dissipating them within the jurisdiction and so stultifying any judgment in favour of the plaintiff.** It has been steadily widened so that it is now available in a personal injury claim (emphasis added).

[16] In *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 the Supreme Court had reaffirmed the legal position and the powers of superior courts to grant this remedy when it said the following:

> The decision in Zainal Abidin has been followed in *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.*, (3) *Ace King Pte. Ltd. v. Circus Americano Ltd. & Ors* (4) and in *S & F International Limited v. Trans-Co Engineering Sdn. Bhd.* (5) There should be no doubt now that the Mareva remedy is here to stay. The issue of jurisdiction has been discussed thoroughly in all the cases cited, and with respect we are not persuaded that our courts have no jurisdiction to do what is just by way of Mareva injunction.

[17] The above case of *Aspatra Sdn Bhd* had described the need to issue this remedy, in order to keep the assets of a 'foreign defaulter' within jurisdiction, to prevent injustice caused to a successful litigant. The aim of such an injunction is not to provide a plaintiff with security of claim but to restrain a defendant from putting his assets out of the plaintiff's reach, in order to defeat a judgment (*Injunctions and Companies*, by Nasser Hamid; *The Nagasaki Spirit (No. 1)* [1994] 1 SLR 434; *European Grain & Shipping Ltd v. Compania Naviara SA & Ors* [1990] 2 MLJ 291).

[18] It is thus now quite established that, in order to succeed in a Mareva injunction application, a plaintiff must establish:

i. a good arguable case;

ii. that the defendant has assets within the jurisdiction; and

iii. that the assets were being disposed intentionally or have the effect of stultifying any judgment in favour of the plaintiff (*Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50; *Ace King Pte Ltd v. Circus Americano Ltd & Ors* [1985] 2 MLJ 75; *Pacific Centre Sdn Bhd v. United Engineers (Malaysia)* [1984] 2 MLJ 143: *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 MLJ 153).

[19] In order to succeed in satisfying the above requirements of a good arguable case, much depends on the circumstances of the case, and invariably will depend on the available evidence, normally gleaned from the affidavits. Whether there is any asset within the jurisdiction likewise will depend very much on factual evidence, though more often than not, defendants are more co-operative on

this matter. The issue of risk of whether the assets will be removed from the Malaysian jurisdiction before judgment is satisfied, is more difficult to prove, and issues of probity may arise. It may touch on the conduct of the defendant, the clandestine manner the assets are being removed and the like. In *CBS United Kingdom Ltd v. Lambert & Anor* [1982] 3 All ER 237 Lawton LJ at 242 had remarked:

> In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case to enable the court to assess its strength and should set out what inquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business, domicile, the location of its known assets land the circumstances in which the dispute has arisen. **These facts should enable a commercial judge to infer whether there is likely to be any real risk of default** … (emphasis added).

[20] In a gist there must be some facts upon which the court can properly infer that there is a real danger of the defendant dodging satisfaction of a judgment (*Third Chandris Shipping Corporation & Anor v. Unimarine SA* [1979] 2 All ER 972). Needless to say before any inference is made the learned judge is required to assess the evidence first.

[21] During the appeal, the number of grounds were reduced tremendously and focus was concentrated on the misdirection of the judge on the issue of a good arguable case, and the unproved issue of the dissipation of the assets leading to a real risk of a default in the satisfaction of a judgment. Now forewarned we shall attempt not to stray outside those indicated parameters.

A Good Arguable Case

[22] Scrutinizing the judgment of the learned judge, he had opined and equated the existence of a serious question to be tried, which was connected to the contract of service requiring a full-blown trial, with a good arguable case. We viewed this opinion as a misdirection as he had stopped short at that. The learned judge should have taken the extra step of assessing the facts and thenceforth arrive at a finding whether a good arguable case had been established.

[23] As stated much earlier, in order to succeed in a Mareva injunction application, a plaintiff must establish for starters a good arguable case. What is arguable has to be in relation to the whole case and not some isolated minor issue or supplementary argument. As an example, the learned judge here had posed the supplementary question as regards the law applicable ie, whether it be German or Malaysian. He said, since it fell within the realm of question of fact, it could only be determined at a full trial, whereupon he remarked that with that latter issue left unresolved a good arguable case thus was established. Not only a wrong test had been applied again, but to elevate and equate this issue of choice of law, which is a supplementary argument with the concept of a good arguable case, would militate against the law of Mareva injunction as prognosed in the preceding paragraphs. A good arguable point does not tantamount to a good arguable case; the totality of points may qualify as a case. On the other hand, lest this panel be accused of oversimplification, we are not unmindful that if a point on its own may lead to the applicant having a fair chance of success, then it cannot be minor or purely supplementary.

[24] Having perused the evidence, especially the Contract of Service, it was this panel's view that parties had agreed that the agreement would be governed by German labor law, as expressly stated in clause 12.4, supported further by documented admissions of the respondent (RR 160 para 50.2 and RR 435). Clause 12.4 in crystal clear terms had provided:

> This contract is subject to German Labor laws.

[25] With the choice already freely made by the contesting parties, it was thus quite wrong for the learned judge to persist with the view that doubts still existed as to which law applied.

[26] To arrive at a finding that a case is arguable, let alone a good arguable case, a judge hearing a Mareva injunction application must assess the available evidence beforehand. Unless that is done, the presiding judge will be unable to decide whether the applicant has a fair chance of obtaining judgment, if the matter were to go for trial (*Biasamas Sdn Bhd & 3 Ors v. Kan Yan Heng* [1998] 4 CLJ 754). In *Ninemia Maritime Corp v. Trave Schiffahrthesellshaft mbH & Co.* [1983] 1 MLJ 1412 Mustill J (QBD) had occasion to state:

> That the judge hearing a Mareva application is not only entitled but bound to make some assessment of the plaintiff's chance of success at the trial is, I believe, not open to dispute.
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> The buyers had appealed against Mustill J's decision. In the course of dismissing the appeal, Kerr LJ had stated:
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> It follows that the evidence, including the evidence on the second question posed by the judge to which we turn in a moment, must be looked at as a whole. A 'good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction. But **at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction** (emphasis added).

[27] In the appeal before us, in the grounds of judgment, the learned judge had authored:

> Plaintiff's case of good arguable case is premised on the Contract of Service …
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> In essence the serious issue that needs to be addressed is whether there is a breach of the express and/or implied terms of the contract of service in terminating the Plaintiff's employment through the notice of termination – exhibit JSH5 in Enclosure 3 where termination not only goes against the grain of a long term contract as envisaged by the contract of service but also done in bad faith and not for just cause and excuse.

[28] A thorough perusal of the grounds of judgment revealed that there was absence of any finding of the chances of the respondent's case, and even if the grounds of judgment were not a talking judgment, the learned judge certainly had failed to assess the strength of his case. To wind this issue up, to be able to identify a serious issue, and to arrive at a conclusion whether a judge can rate an applicant's success after assessing the evidence adduced, are two totally different things. By his failure to assess the respondent's chances of success, the learned judge here could not have been able to decide whether the applicant had established a good arguable case or not.

[29] In the circumstances of the case, what with the misdirection and want of assessment, suffice if we stop here and refrain from delving into the merits of the case, in order not to hamper the trial judge when dealing with the trial proper.

A **Any Danger That With The Dissipation Of The Assets The Judgment Would Be Left Unsatisfied**

[30] A threshold that the respondent must also satisfy was whether there was any danger that the disposal of the assets B would stultify the judgment. Be it intentional or that the effect of the disposal would stultify the judgment it must be established by the respondent. On this requirement the learned judge had made the following remarks:

C > On the third requirement of removal of assets outside jurisdiction it is established through the defendant's own notification to one of its customers ABB Thailand through exhibit JSH8 in Enclosure 3 of its intention to cease operations in Malaysia in March 2007 and there is no express rebuttal of the relocation of the operations to China by the defendant.

D **[31]** Inexplicably, apart from the above excerpt, nothing was discussed about the danger of disposal of the assets defeating a judgment, a requirement that must be established as laid down by the *Aspatra Sdn Bhd* case. It is trite law that in order to succeed E in a Mareva injunction application, dissipation of assets *per se* is incomplete unless the applicant also successfully establishes the fact that the dissipation are preemptive acts that would lead to an intentional stultifying of any judgment that may be obtained. The two ingredients must go hand in hand.

F **[32]** It was never denied that the appellant had assets in Malaysia. Furthermore it was not denied that relocation to China was in the offing. Regretfully the learned judge had oversimplified matters by concluding that just because relocation was in the offing, even though openly admitted by the appellant, by the G dissipation of the assets a default of a judgment must necessarily follow. That is not how the law works. First there must be a factual finding exercise. The learned judge needs to be subjectively satisfied that the injunction is to prohibit the dissipation of assets by the appellant in order to avoid any danger of the appellant H defeating a judgment. Without that exercise how is the learned judge to be subjectively satisfied? Here he never undertook that exercise. Lawton LJ in *Third Chandris Shipping Corporation & Anor v. Unimarine SA* [1979] 2 All ER 972 had occasion to state:

I > … there must be facts from which the Commercial court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from jurisdiction …

[33] The appellant is a company and has an ongoing business. It must be more profitable to go to China as that idea was mooted in its Shareholders Meeting as early as year 2000 (RR146), two years and ten months before the respondent was recruited and certainly years before the termination letter. We were eventually impressed that this relocation exercise was *prima facie* for a legitimate purpose, let alone it would be absolutely unreasonable businesswise to relocate its assets to China, merely to avoid paying a mere judgment whence in year 2006 its net assets stood at RM9,753,238 (RR 149). For all one knows the judgment may even go the way of the appellant.

[34] This issue of relocation, which played a major role in the termination of the respondent, by our reckoning, would fall squarely within the ambit of cl. 2.3 of the Contract of Service (see above). It certainly would qualify as "important reasons prevail, through extraordinary termination" and therefore justify the termination of the respondent. We were not convinced that his termination was a *mala fide* act; in fact we were satisfied that the exercise was in the best interest of the appellant company. Furthermore there was not a shred of evidence to establish that the disposal of the assets was with the intention of stultifying any judgment or with the effect of defeating a claim (see per Raja Azlan CJM in *Zainal Abidin v. Century Hotel Sdn Bhd (supra)* at 264. His Royal Highness had said:

> In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets **with the intention or with the effect of defeating a claim** (emphasis added).

[35] That being so this panel was unconvinced that the respondent had successfully established the ingredients under this heading.

[36] Based on the above reasons we had no hesitation in unanimously allowing the appeal with costs here and below. To regurgitate the learned judge had erred when:

i. he equated 'a good arguable case' with a mere identification of a serious question to be tried (a test for an *interim* injunction under O. 29 of the Rules of the High Court 1980 at best), compounded by his failure to sift the evidence (leading to an inability to decide whether a good arguable case had been established); and

A ii. had failed to sift through the evidence adduced, thus denying him the chance to infer that the dissipation of the appellant's assets would lead to a stultifying of a judgment.

[37] The consequential orders made by us were as follows:

B 1. the order of the High Court be set aside;

2. the deposit be refunded to the appellant; and

3. matter be remitted to the High Court for damages to be C assessed by the senior assistant registrar.

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